IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.1 OF 2005

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Oil and Natural Gas Corporation Ltd. ...Appellants

v/s.

M/s.Jagson Intl.Ltd. ...Respondents

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Shri Rajiv Kumar i/b Divya Shah & Associates for the Appellants.

Shri Janak Dwarkadas i/b Mr.Ashwin Shankar for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 15TH JULY,2005

JUDGMENT:

1. By this Appeal filed under Section 37 of the Arbitration & Conciliation Act, the Appellants challenge the order dated 9th August, 2004 passed by the Arbitral Tribunal.

2. The facts that are material and relevant for deciding this Appeal are; in July, 1999, the Appellants invited a tender bearing No.MRBC/DBG/MM/RIGS(CH)/51(46)/990T-873 for the charter hire of one slot/Cantilever type Jack up rig.

3. In response to the invitation of the aforesaid tender, five bidders submitted their offers including the Respondents and one M/s.Neptune Exploration and Industries Ltd.(hereinafter referred to as "M/s.Neptune") was also one of the bidders. The Respondents and M/s.Neptune offered the same Rigs "Sakhalinskaya" and "Kurilskaya" for the said tender. The Appellants had called upon the Respondents and M/s.Neptune to clarify and interalia confirm the availability of the said Rigs. M/s.Neptune furnished

to the Appellants a letter dated 8th December, 1999 from M/s.Osneft Sakhalinmorneftegaz, the rig owners regarding the availability of the two rigs to the aforesaid two bidders namely M/s. Neptune and the Respondents. By a letter dated 22nd December, 1999, the Appellants called upon the Respondent inter alia to confirm: (a) continued availability of Rig Sakhalinskaya against tender alongwith confirmation thereof from the owners to enable the Appellants to consider the offer for the said Rig; (b) to confirm details in respect of the said rig Kurilskaya with documentary proof from the owner, as details submitted by M/s.Neptune were different from those submitted by the Respondents. By this letter, the Appellants intimated the Respondents that they were in receipt of communication dated 8th December, 1999 which had been addressed to the Respondents by the owners of the Rig Sakhalinskaya. Due to the said letter having been communicated to the Appellants, the Appellants had sought clarification from the Respondents regarding the continued availability of the said rig. By letter dated 22nd December, 1999, the Respondents replied to the Appellants' letter dated 22nd December, 1999. The Respondents stated that they had signed agreement dated 20th August,

1999 with the owner of the rig and as per the said agreement, the owner of the said rig would invest in the rig for upgradation to meet the Appellants' tender specifications. In respct of rig Sakhalinskaya, the Respondents submitted MOU dated 20th August, 1999 executed with the owners to the Appellants. Letter from M/s.Soil Mee which is referred to in the Respondents' aforesaid letter is dated 13th December, 1999 confirming that upgradation of rig from 850 thousand LBS to 13 lakhs LBS (Mast) was possible. The Respondents stated that they had valid documents in their favour for mobilization of both the rigs and assured the Appellants that rig Sakhalinskaya would be available to them for the duration of contract. By letter dated 3rd January, 2000, the Appellants informed the Respondents that their offer for both the rigs i.e. Sakhalinskaya and Kurlskaya was being considered for the price bid opening. The price bids were opened on 6th January, 2000 and the Respondents were found to be the lowest tenderer in respect of the said two rigs. By letter dated 17th January, 2000 addressed by the owners of the rig with copy to the Respondent that rig owners recorded that rig Kurilskaya was being withdrawn from the Appellants tender so as not to jeopardize the

drilling programme of the Appellants. On 20th January, 2000, the Appellants placed on the Respondents, a firm work order bearing No.DY8DF158 for charter hire of one rig by the name "Sakhalinskaya" with an ODR of US$ 21,637 and EDR US$ 21,990.21.

4. The Respondents furnished to the Appellants an irrevocable and unconditional Performance Bank Guarantee bearing No.IDBIBK/No/BG-2000/F-1 dated 3rd February, 2000 for a sum of US$ 601,982.00 issued by IDBI Bank Ltd., Siri Fort Branch, New Delhi. By the said guarantee, it was agreed by the bank that any such demand by Appellants on the bank shall be conclusive and binding without any proof on the Bank as regards the amount due and payable, notwithstanding any disputes pending before any Court, Tribunal, Arbitrators and/or any other matter or things whatsoever, as liability under the Guarantee being absolute and unequivocal. The said Bank Guarantee is amended on 5th February, 2000 and further amended 20th April, 2000.

5. Thereafter, the Respondents requested the Appellants to add the Rig Kurilskaya in the firm

order. On basis of representations made by the Respondents, the Appellants issued an amendment dated 13th April, 2000 to the firm fax order dated 20th January, 2000 amending the firm order so as to include () "Sakhalinskaya/Kurilskaya", (2) the mobilization time of 180 days was to be reckoned from the date of issue of the amended order and (3) the time of 60 days for offering the rig for inspection will also be reckoned from the date of issue of the amended order. All other terms and conditions of the firm order dated 20th January, 2000 remained unchanged. The Respondents accordingly, furnished to the Appellants an amended Performance Bank Guarantee dated 3rd February, 2000 bearing No.IDBIBK/ND/BG-2000/F-1 issued by IDBI Bank Ltd Siri Fort Branch, New Delhi for an amount of US$ 601982.00 forming an integral part of the Original Bank Guarantee.

6. As per the terms and conditions stipulated under the firm order dated 13th April, 2000, the Respondents were under an obligation to offer any of the two rigs for inspection on or before 11th June, 2000 i.e. within 60 days from 13th April, 2000 and mobilize the rig latest by 10th October, 2000 i.e.

within 180 days from 13th April, 2000. The Appellants rely on clause 6 of the tender documents, which reads as under:-

> **"6. Inspection Clause**
>
> **The bidder should confirm in the unpriced bid that the equipment of the offered rig are in good working condition and the acceptance of the following 'Inspection Clause':-**
>
> **6.1 ONGC shall get the rig and equipment inspected through any of the following internationally reputed third party inspection agency as per the Tender specifications. ONGC and its option can nominate any one of the following third party inspection agency for the inspection of the rig and the cost of the third party inspection will be borne by ONGC:-**
>
> **a) MODU SPECS**

b) ABS

c) Oilfield Audit Services Inc.

d) DNV

6.2 ONGC will accept the rig only after ONGC nominated third party inspection agency confirms that the rig is as per tender specifications.

6.3 Bidders should confirm that they would offer rig(s) for inspection by ONGC nominated third party inspection agency, within 60 days from the date of issuance of firm order.

6.4 Notice for inspection as per (6.3) above is required to be given by the contractor 15 days in advance.

6.5 Maximum time allowed to board the rig for inspection of the rig is 20 Mans days per rig. The contractor has to offer the rig for inspection on complete readiness of the rig. In case inspection takes more than 20 mans days, the cost of inspection

beyond 20 man days would be to the account of the Contractor. In case inspection team is to be mobilized subsequently, for compliance of deficiencies during first inspection, then entire cost towards second or subsequent inspections shall be to the account of the Contractor."

7. By a letter dated 17th April, 2000 the Appellants called upon the Respondents to furnish the time schedule alongwith action plan and programme latest by 24th April, 2000 and to intimate the steps taken by the Respondents for adhering to the time schedule given for inspection of the rig within 60 days and mobilization within 180 days from 13th April, 2000. The Respondents were also requested to submit the progress on the above schedule by fax every Monday.

7A. There was correspondence exchanged between the parties regarding inspection of the rigs. But it transpires that the rigs were never offered for inspection. It further appears that by letter dated 24th May, 2000, a copy of draft contract was sent by

the Appellant to the Respondent to be signed by the parties. But it appears that the draft contract was also not signed. By letter dated 5th October, 2000 the Appellant recorded that the Respondent had failed to comply with the terms and conditions of the tender, the firm work order with regard to inspection of the rig and signing of the contract and had failed to submit the program for mobilization of the rig. It, thus, appears that the dispute between the parties arose. Ultimately in January, 2002, the Respondent moved an application under Section 9 of the Arbitration and Conciliation Act before the Delhi High Court seeking interim relief against the Appellant restraining it from invoking the bank guarantee. In that application an exparte injunction was secured. It appears that that application was heard finally by the Delhi High Court and the order was reserved. The Respondent moved an application before the Delhi High Court for permission to withdraw that application and that application was ultimately withdrawn by the Respondent.

8. Thereafter, the Respondents moved an application before the Arbitral Tribunal under Section 17 of the Act seeking stay of encashment of the bank guarantee. That application has been decided by the Appellate Tribunal by order dated 9th August, 2004. Present appeal has been filed challenging that order.

9. The present appeal has been filed in the Court on 11-1-2005.

10. Preliminary objections to the maintainability of the appeal have been raised on behalf of the Respondents. The first objection raised on behalf of the Respondents is that the appeal has not been filed within the period allowed by the Arbitration & Conciliation Act, 1996. It is submitted that though Section 37 of the Act does not prescribe any limitation for filing an appeal, provisions of Section 37 should be read along with the provisions of Section 34 of the Act and the same period of limitation which is provided by Section 34 of the Act for making an application should be made applicable to the appeal filed under Section 37. If so done, the appeal is barred by the law of

limitation, because it was not filed within the period of limitation provided by Section 34. It is further submitted that even assuming that there is no period of limitation provided by Section 37, there would be an obligation on the Appellants to file an appeal within a reasonable time and if the matter is looked at from this point of view, there is inordinate delay in filing the appeal and therefore the appeal should not be considered on merits. The second objection that is raised is that the petition under Section 9 of the Act was filed before the Delhi High Court by the Respondent, that petition was withdrawn by the Respondents, as the application was in fact made before the Delhi High Court in view of the provisions of Section 42 of the Act, the present appeal will not be maintainable before this Court and it is only the Delhi High Court which will have the jurisdiction to entertain the appeal.

11. So far as the first objection raised on behalf of the Respondents is concerned, the Appellant submitted that this is an appeal filed against the interim order passed by the Arbitral Tribunal under Section 17 of the Arbitration Act. Section 37 of

the Act itself does not provided any period of limitation and therefore there is no justification for importing and making applicable the period of limitation provided by Section 34. It is next submitted that as per the terms of the contract between the parties, as the contract was entered into at Bombay, it is the court in Bombay which has the jurisdiction to entertain the application filed under Section 9 of the Act. This objection was raised before the Delhi High Court and the Respondent withdrew that application filed under Section 9 before the Delhi High Court, after it was fully argued and the judgment in that application was reserved. In the application filed by the Respondents for permission to withdraw the application, it was stated that the Respondents want to withdraw the application with liberty to file before the Bombay High Court, and therefore, now the Respondent can not contend that it is not the Bombay High Court, but the Delhi High Court which has the jurisdiction. It is submitted that in order that the bar of Section 42 operates to oust the jurisdiction of this Court, it must be shown that the application that was filed before the Delhi High Court was a competent application and it was

maintainable before the Delhi High Court.

12. So far as merits of the controversy are concerned, on behalf of the Appellants it is contended that an injunction against the invocation of the bank guarantee has been issued by the Arbitral Tribunal contrary to the settled law on the point. It is submitted that the Arbitral Tribunal has granted an injunction against the invocation of the bank guarantee merely because the allegations of fraud have been made. The Arbitral Tribunal has not gone into the question whether the allegations of fraud have, prima facie, been established by the Respondents. It is further submitted that what has been done is that the temporary injunction against the invocation of the bank guarantee has been granted. Had the injunction not been granted the bank guarantee would have been invoked. In case, the Respondents ultimately succeeds, he would be entitled to get the amount of bank guarantee back, therefore, had the temporary injunction been declined there is no possibility of any irreparable loss being caused to the Respondents. Because loss of money is capable of being compensated in terms of money and it can never be termed as irreparable loss

and therefore, according to the Appellant, there was no justification for the Arbitral Tribunal to grant the temporary injunction against invocation of the bank guarantee.

13. Now, in the light of these rival submissions if the record of the case is perused, it becomes clear that the present appeal has been filed under Section 37 of the Arbitration & Conciliation Act challenging the order passed under Section 17 of the Act by the Arbitral Tribunal. Section 37 of the Act reads as under:-

> **37. Appealable Orders.**
>
> **(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:**
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> **(a) granting or refusing to grant any measure under section 9;**
>
> **(b) setting aside or refusing to set aside an arbitral award under section 34.**
>
> **(2) An appeal shall also lie to a court from an order of the arbitral tribunal-**
>
> **(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or**

> **(b) granting or refusing to grant an interim measure under section 17.**
>
> **(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.**

14. Perusal of the above quoted provisions of Section 37 shows that sub-Section (2) of Section 37 in terms provides for an appeal against the order granting or refusing to grant interim measure under Section 17. Perusal of Section 37 also shows that there is no period of limitation laid down for filing an appeal under that provision. Perusal of the provision of Section 34 shows that there is a clear provision made for filing an application under that provision for challenging an award made by the Arbitral Tribunal. Therefore, when the Legislature provided the remedy against the arbitral award, it also provided a period of limitation for making an application under Section 34. Perusal of the provisions of Section 11, Section 13 and Section 16 show that the Legislature has mentioned a period of time for taking various steps. Therefore, it is clear that while the Legislature was aware of the necessity of providing a period of limitation and

wherever the Legislature thought that providing a period of limitation is necessary it has been so provided for by various provisions of the Act. However, while providing an appeal under Section 37, the Legislature has chosen not to prescribe any period of limitation. In this view of the matter, therefore, in my opinion, the Court will not be justified in importing the period of limitation provided by Section 34 for filing an application and making it applicable to an appeal filed under Section 37. Sub-section 1 of Section 43 makes the provisions of Limitation Act applicable to arbitration as it applies to proceedings in Court. Perusal of the provisions of the Limitation Act also shows that the Limitation Act does not provide for any period of limitation for filing an appeal under Section 37. It is second Division of the Schedule to the Limitation Act which deals with appeal. Perusal of those provisions show that Articles 114 and 115 lays down period for filing an appeal under the Code of Criminal Procedure and Article 116 provides for limitation for filing an appeal under the Code of Civil Procedure and Article 117 provides period of limitation for filing an appeal from decree or order passed by the High Court to the same

court. Thus in the Limitation Act there is no provision made prescribing the period of limitation for filing an appeal under Section 37. Perusal of Article 119, which is found in Third Division, the heading of which is "application" shows that there is a period of limitation laid down by Article 119 for making application under the Arbitration Act, 1940. The intention of the Legislature , in my opinion, therefore is clear that there is no period of limitation laid down for filing an appeal under Section 37. In my opinion, in this situation, therefore, the observations of the Supreme Court in its judgment in the case of Uttam Namdeo Mahale v/s. Vithal Deo and ors., (1997) 6 SCC 73, are relevant. It is **paragraphs 3 and 4 of that judgment, which are material. They read as under:-**

> **3. The admitted position is that Respondent No.1 is the owner of the property and earlier a notice was issued to the appellant to vacate the land in question. That order of eviction became final with the confirmation of the order by this Court in a special leave petition. Thereafter, proceedings were initiated for execution. An objection has been raised on the ground that since more than 12 years have elapsed, the order cannot be implemented. The High Court has pointed out that under Section 21 of the**

> **Mamlatdar's Court Act, 1906, it has not prescribed any limitation for execution of the orders vide the Division Bench judgment of the High Court of Bombay in Balaji Bin Khanduji Patil v. Kushaba Bin Ramji Patil.**
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> **4. Mr.Bhasme, learned counsel for the appellant, contends that in the absence of fixation of the rule of limitation, the power can be exercised within a reasonable time and in the absence of such prescription of limitation, the power to enforce the order is vitiated by error of law. He places reliance on the decisions in State of Gujarat v. Patil Raghav Natha; Ram Chand v. Union of India and Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim. We find no force in the contention. It is seen that the order of ejectment against the applicant has become final. Section 21 of the Mamlatdar's Court Act does not prescribe any limitation within which the order needs to be executed. In the absence of any specific limitation provided thereunder, necessary implication is that the general law of limitation provided in the Limitation Act (Act 2 of 1963) stands excluded. The Division Bench, therefore, has rightly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise. The cited decisions deal with that area and bear no relevance to the facts.**

15. Perusal of the above quoted paragraphs of the judgment of the Supreme Court show that the Supreme Court has laid it down as a law that when the special statute which creates the remedy does not

provide limitation, for invoking that remedy general law of limitation cannot be made applicable to provide limitation. In the present case, however, as observed above, even the general law of limitation does not provide a period of limitation. In my opinion, therefore, the objection raised on behalf of the Respondent that appeal is barred by the provisions of the Limitation Act and it has not been filed within the time prescribed has no substance. So far as the contention that though there is no period of limitation laid down , the Appellant has to approach the court in a reasonable time is concerned, in my opinion, this requirement will not apply while considering the aspect of maintainability of the appeal. The appeal would be maintainable whenever filed, the question whether the Appellant has approached the court promptly or he is guilty of latches may be considered by the Court while considering whether the relief which is in the discretion of the court should be granted in favour of such Appellant, who is guilty of latches or not. In other words the aspect of latches in invoking the remedy will be relevant when the court considers the question whether the Appellant is entitled to the reliefs from the court which is in

the discretion of the Court and not when the court considers the question of maintainability of the appeal.

16. So far as the second objection raised to the maintainability of the appeal is concerned, Clause 29.1 of the tender document is relevant. Clause 29 and clause 29.1 reads as under:-

> **29.0 Jurisdiction and Applicable Law.**
>
> **29.1 This agreement including all matter connected with this Agreement shall be governed by the laws of India (both substantive and procedural) for the time being in force and shall be subject to exclusive jurisdiction of the Indian Courts (the place where the contract is signed in India)**

17. Despite this clause, an application under Section 9 of the Act was filed by the Respondents before the Delhi High court. Maintainability of that application was objected to by the Appellant.

The Delhi High Court heard both the parties on the application and reserved its order. At that stage, while application was reserved for orders, the Respondents moved an application. Paragraphs 4, 5 & 6 of that application are relevant. They read as under:-

> **4. That it is submitted that during the course of arguments the respondent raised the preliminary objection in respect of territorial jurisdiction of this Hon'ble Court to entertain the present petition. The respondent contended that only the Courts in Bombay has jurisdiction to entertain the present petition.**
>
> **5. That it is submitted that in view of the contentions made by the respondent the petitioner wishes to withdraw the present proceedings to be filed in the appropriate Court of Bombay. Further this Hon'ble Court on 11.1.2002 passed stay against the respondent for encashment of the Bank Guarantee in question. It is respectfully**

submitted that the said stay be continued for fifteen days from the date of the withdrawal of the present petition for filing the same in appropriate Court having territorial jurisdiction to try the same.

6. That the respondent would suffer irreparable loss and injury if the present application is not by this Hon'ble Court and the suit is not allowed to be withdrawn to be filed in the appropriate Court in Bombay.

18. Perusal of this application shows that the Respondents conceded the position by the application that the Delhi High Court does not have the jurisdiction and that it is only the appropriate court in Bombay which will have the jurisdiction to entertain the application. On this application, the Delhi High Court made an order permitting the Respondents to withdraw the application. In stead of filing the application under Section 9 before the Court in Bombay, the Respondents filed an application under Section 17 before the Arbitral

Tribunal. The objection of the Respondents is based on the provisions of Section 42 of the Arbitration Act. Section 42 reads as under:-

> **42. Jurisdiction-Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.**

19. Perusal of the above quoted provision shows that if an application is made in a court, it is only that court which has the jurisdiction in relation to any subsequent applications. But the first application which is made, in order that the bar of Section 42 is attracted, must be a competent application and not just any application. The Respondents filed the application before the Delhi High Court, an objection was raised as to the jurisdiction of that High Court to entertain the application. It was possible that the objection would have been upheld by that High Court. In that

situation the Respondents would not have been entitled to claim that because that application was filed before the Delhi High Court, it is that High Court before which, because of the provisions of Section 42 of the Act, all subsequent applications should be made. Now, therefore, when the Respondent withdrew the application conceding the position that the Delhi High Court does not have the jurisdiction to entertain the application, it will be unjust and unfair to permit him to raise the objection. In my opinion, the conduct of the Respondents of withdrawing the application filed in Delhi High Court because of the objection raised by the Appellant dieentitles it to turn around and say that it is the Delhi High Court which has the jurisdiction and not this Court. The Respondent had conceded the position that the Delhi High Court does not have the jurisdiction and accepting that concession the Delhi High court permitted the Respondents to withdraw the petition. In my opinion, therefore, it will not be in the interest of justice to permit the Respondents to resile from that position. In any case I find that it is nobody's case that this court will not have the jurisdiction. The tender was admittedly accepted in

Bombay. Therefore, in terms of clause 29.1 of the tender document, it is this court which will have the jurisdiction. In my opinion, in the face of the application of the Respondents filed before the Delhi High Court, it cannot now be permitted to raise the objection to the maintainability of the present Appeal before this Court. The objection thus, has no substance.

20. So far as the order of the Arbitral Tribunal granting temporary injunction restraining invocation of the bank guarantee is concerned, perusal of the order of the Arbitral Tribunal shows that the Arbitral Tribunal has granted temporary injunction only because the Respondents have made allegations of fraud. Perusal of the order shows that the Arbitral Tribunal has not gone into the allegations to find out whether, prima facie, the Respondents have been able to establish the involvement of fraud. In my opinion, this approach adopted by the Arbitral Tribunal is totally impermissible. So far as the law relating to invocation of the bank guarantee is concerned, it is well settled because of series of judgments of the Supreme Court. In my opinion paragraphs 12 and 13 of the judgment of the

Supreme Court in the case of U.P. State Sugar Corporation v/s. Sumac International Ltd., (1997) 1 SCC 568, makes the law on the point absolutely **clear. They read as under:-**

> **12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction or commercial dealings in the country. The two grounds are not necessarily connected, though both**

may coexist in some cases. In the case of U.P.Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or nor, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattam Bank (All ER at p. 352): (at SCC P.197)

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."

> **This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.**
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> **13. The same question came up for consideration before this Court in Svenska Handelsbanken v. Indian Charge Chrome. This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of Itek Corpn. v/s. First National Bank of Boston. On the question of fraud this Court confirmed the observations made in the case of U.P. Coop. Federation Ltd. and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.**

21. Perusal of the above quoted paragraphs of the judgment of the Supreme Court clearly shows that invocation of the bank guarantee cannot be interfered with by the Court, unless there is an established fraud or irreparable injustice involved in the case. It is thus clear that mere allegation of fraud is not enough to issue an injunction against invocation of bank guarantee. The allegation of fraud must be established at least prima facie. It is further to be seen here that the result of invocation of the bank guarantee is that the amount for which the bank guarantee is given is recovered. Therefore, the party which has given the

bank guarantee suffers loss of money. Loss of money never causes any irreparable injury. An interim order of injunction can be made only when the court or the tribunal finds that apart from the fact that the applicant making out a strong prima facie case **and showing that the balance of convenience is in favour of grant of the temporary injunction, the applicant would suffer an irreparable injury if the** temporary injunction is not granted to him. Thus for grant of temporary injunction a finding that in case **injunction is not granted, the applicant would suffer irreparable injury is a condition precedent. While granting the interim order by the order impugned the Arbitral Tribunal has not recorded any such finding. Therefore, even if it is assumed that the Appellant was not justified in invoking the bank guarantee, the Arbitral Tribunal while deciding the matter finally would be within its power in making an order for payment of that amount by the Appellant to the Respondents with interest at an adequate rate. Considering that the Appellant is ONGC, there can be no doubt that the decree for any amount that may be made would be executable and thus, there is no possibility of the Respondents suffering any irreparable injury due to invocation of the bank**

guarantee. In my opinion, therefore, as there is no possibility of the Respondents suffering any irreparable injury, there was no justification whatsoever for making an order restraining the Appellant from invoking the bank guarantee. The impugned order made by the Arbitral Tribunal is, therefore, liable to be set aside.

22. In the result, therefore, the appeal succeeds. The order impugned in the appeal is set aside. The Respondents are directed to pay costs of this petition as incurred by the Appellant.

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